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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1955.

No. .....

Leona Holcomb, individually, Leona Holcomb, as guardian of the person and estate of Donald George Fleming, a minor; Donald George Fleming, a minor; Edward Denham, Frank T. Denham, George Denham, Clarence M. Denham and Mary Jane Hopkins, *Petitioners*,

vs.

Aetna Life Insurance Company, a corporation, *Respondent*.

PETITION FOR *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.

Petitioners Leona Holcomb, individually, Leona Holcomb, as guardian of the person and estate of Donald George Fleming, a minor; Donald George Fleming, a minor; Edward Denham, Frank T. Denham, George Denham, Clarence M. Denham and Mary Jane Hopkins, respectfully pray certiorari to the United States Court of Appeals, Tenth Circuit, to review a decision entered in case No. 5056 in said court affirming an injunction issued by the United States District Court for the Northern District of Oklahoma, entered in case No. 3502 in which petitioners were defendants and respondent, Aetna Life Insurance Company, a corporation, was plaintiff, and denying rehearing.

(a) Opinions in the Courts Below.

The opinion delivered in the Court of Appeals (not officially reported) as well as pertinent oral statements by the United States District Court at the time of entry of the injunction complained of are appended, chronologically arranged as entered.(1)

(b) Grounds on Which the Jurisdiction of this Court Is Invoked.

The judgment and decree of the United States Court of Appeals for the Tenth Circuit and order affirming was entered August 3, 1955; by order of August 22, 1955, time to file Petition for Rehearing was extended five days; Petition for Rehearing was filed August 25, 1955, and denied September 29, 1955.

On October 11, 1955, an order of the United States Court of Appeals was entered staying mandate for a period of 30 days from that date and on the 10th day of November, 1955, said Court of Appeals ordered mandate stayed until December 26, 1955.

Jurisdiction of this Court to issue certiorari is invoked under 28 U. S. C. 1254 (1), which reads:

> "Cases in courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *."

---

(1) Appendix, pp. 21 to 32.

(c) The Questions Presented for Review.

The questions for review by this Court with specific reference to the statutes involved are as follows:

I. Under the Statutes of the United States (28 U. S. C., Sec. 1335 and Sec. 1397), vesting in United States District Courts original jurisdiction of civil actions in the nature of interpleader and under 28 U. S. C., Sec. 2361, providing that in any such action a district court may issue its process restraining all claimants from instituting or prosecuting any proceeding in any state court affecting the plaintiff's obligation until further order of court, which process shall be returnable at such time as the court or judge thereof directs, *may a United States District Court, or the judge thereof, on oral application and on the basis of an unverified Amendment to Complaint, and without taking any evidence or any showing of present urgency, issue an injunction, permanent in form, and not returnable at such time as the court or judge thereof directs, enjoining prosecution in a state court of competent jurisdiction of an action previously instituted against the plaintiff for the recovery of damages in a tort action at law?*

II. *Is the authority of United States District Courts to enjoin prosecution of actions in state courts of competent jurisdiction under the foregoing statutes* (28 U. S. C. 1335, 1397, and 2361) *unlimited, or governed and controlled by 28 U. S. C. 2283, which imposes restraint on power of the United States District Court to enjoin prosecution of pending actions in state courts, and by F. R. C. P. 22 and F. R. C. P. 65, which limit narrowly the conditions under which injunctions and restraining orders may be granted and specifically provide for notice, hearing and bond?*

III. *Under the statutes of the United States and Rules of Federal Procedure relating to actions in the nature of interpleader, are federal courts authorized to enjoin prosecution of tort actions for damages pending in the state courts, particularly where the maximum asserted liability of the interpleader claimant in the federal court is $162,606 and the amount of damages claimed in the state court is $462,703.88?*

(d) *Statutory Provisions and Rules of Civil Procedure Involved.*

To sustain an injunction so issued, the Court of Appeals relied upon 28 U. S. C. 1335,(1) which that court summarizes as follows:

> "28 U. S. C. A., Sec. 1335, provides that the district courts shall have original jurisdiction of civil actions of interpleader or in the nature of interpleader filed by any corporation having in its custody or possession money of the value of $500 or more, or having issued a certificate, or policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment of money of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if two or more adverse claimants, of diverse citizenship as defined in section 1332 of the title, are claiming or may claim to be entitled to such money, or to any one or more of the benefits arising by virtue of any certificate, policy, or other instrument, or arising by virtue of any such obligation, and if plaintiff has deposited in the registry of the court such money or the amount due under such obligation, there to abide the judgment of the court, or has given bond payable to the clerk in such amount and with such surety as the court or judge may deem prop-

(1) For text in full see Appendix, p. 50.

er, conditioned upon compliance by plaintiff with the future order or judgment of the court; and that such action may be entertained although the title or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another."

The court further relied upon 28 U. S. C., Sec. 1397, relating to venue in interpleader suits. This section reads:

"Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside. June 25, 1948, c. 646, 62 Stat. 936."

The Court of Appeals found further authority to sustain an injunction so issued in 28 U. S. C. 2361, which reads:

"Sec. 2361. *Process and Procedure.* In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

"Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment. June 25, 1948, c. 646, 62 Stat. 970, amended May 24, 1949, c. 139, Sec. 117, 63 Stat. 105."

Petitioners contend the foregoing statutes authorize *ex parte,* only a *temporary restraining order* "to be returnable at such time as the court or judge thereof directs"; that they require the court to "hear and determine the case."

Petitioners contend 28 U. S. C. 2361 is expressly limited by 28 U. S. C. 2283, which reads:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. June 23, 1948, c. 646, 62 Stat. 968."

Petitioners further contend that said injunction so issued violates the last sentence of Rule 22 of Federal Rules of Civil Procedure, which rule reads:

> "(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another or, that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.
>
> "(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U. S. C., Secs. 1335, 1397, and 2361. Actions under those provisions shall be conducted in

accordance with these rules. As amended Dec. 29, 1948, effective Oct. 20, 1949."

Petitioners say further that the issuance of such injunction violates Rule 65, F. R. C. P., which provides that no preliminary injunction shall issue without notice, and that no temporary restraining order shall be granted without notice unless from specific facts shown by affidavit or verified complaint immediate and irreparable damage will result before notice can be given and requires the order to recite in detail the urgency warranting failure to give notice.(1)

Petitioners assert that while the Rules of Federal Procedure in no wise modify any statutes relating to temporary restraining orders or preliminary injunctions in actions of interpleader or in the nature of interpleader, the procedure in such actions is governed by both Rule 65 and 28 U. S. C. 2361. Otherwise that part of Rule 22 (2) which reads "Actions under those provisions (28 U. S. C., Secs. 1335, 1397 and 2361) shall be conducted in accordance with these rules," has no substance. Under no construction of either the rules or the statutes is an injunction, without notice, hearing or bond and on oral application, such as is here involved authorized.

(e) Statement of the Case.

On November 12, 1954, the United States District Court for the Northern District of Oklahoma, in the course of hearing various unrelated motions, on oral application of respondent made in open court and without other notice, evidence, hearing or bond entered an injunction, perma-

(1) For full text of Rule, see Appendix, Exhibit 15, pp. 51-53.

nent in form, enjoining the petitioners from the prosecution against Aetna of an action at law then pending in the District Court of Tulsa County, Oklahoma, as cause No. 87402, wherein damages were claimed due and payable to the executor under the will of petitioners' testatrix in the sum of $462,703.88. That the District Court of Tulsa County, Oklahoma, was a court of competent jurisdiction under the laws of the State of Oklahoma, and that said court by the filing of a petition in due form and the issuance and service of process had acquired prior jurisdiction of both the parties and the subject matter in the action there pending is nowhere disputed in the record.

Supersedeas was denied by the trial court and the injunction affirmed on appeal by the United States Court of Appeals for the Tenth Circuit.

On April 16, 1954, Aetna had instituted in the United States District Court for the Northern District of Oklahoma cause No. 3502, which it denominated an action in the nature of interpleader. Aetna asserted that on the 9th day of December, 1950, it had issued an annuity for a single premium of $162,606, payable to various beneficiaries, all of whom were made defendants, and a moiety of which annuity was, subject to certain contingencies, payable to your petitioners. Aetna charged that in case No. 29092, in the District Court of Creek County, petitioners "are claiming to be entitled to have the single premium payment of $162,606 paid back by Aetna to the estate of" petitioners' testatrix.

Aetna prayed an injunction enjoining defendants from prosecuting any pending action "for the recovery of said policy's proceeds, or any part thereof."

On the day its verified complaint was filed, Aetna had sought and obtained *ex parte* and without notice an injunc-

tive order enjoining petitioners without limit as to time from the prosecution of any action "on account of or pertaining to Policy AN 33409" issued by Aetna Life Insurance Company to petitioners' testatrix. A bond in the sum of $25,000 was approved by the Court and filed to sustain this injunction.

No reference was made in Aetna's original Complaint to the suit then pending in the State court in Tulsa County as Cause No. 87402.

On June 23, 1954, Aetna filed an unverified Amendment to Complaint for Interpleader wherein, among other allegations not material to the issue here, it alleged that petitioners here "attacked the validity of the annuity contract in case No. 87,402 * * *."

Exhibit 5 *(annexed to the amendment to complaint for interpleader) discloses that the action which had been instituted by petitioners here in the state court against Aetna and others was a suit at law for damages, actual and punitive in the sum of $462,703.88, for the tortious conversion on October 31, 1950 (before the annuity was applied for or issued), of specific, registered, United States bonds and for fraudulently causing to be placed or placing thereon an "X" purporting to be the signature of petitioners' testatrix.(1)

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(1) In the Appendix hereto, petitioners include:

Exhibit 10: Amendment to Complaint for Interpleader.

Exhibit 11: The Petition filed by petitioners in the state court, appended thereto.

Exhibit 12: The full and complete record of proceedings in the United States District Court on the day the injunction complained of was entered, and

Exhibit 13: The denominated "Order Construing Restraining Order Heretofore Made," which is the injunction herein complained of.

Such was the state of the record in the United States District Court when, on November 12, 1954, the injunction complained of herein was issued. The statements of the United States District Judge themselves show the injunction was being improvidently issued and the curt refusal to accord petitioners' counsel the courtesy or right of a hearing or so much as opportunity to examine the proposed injunction reflects the judicial atmosphere in which the proceeding was conducted.

No additional or other bond was executed than that filed before Aetna's complaint was amended.

The executor under the will of petitioners' testatrix (a party to the state court suit) was not by Aetna made a party to the suit in the federal court.

(f) Basis of Jurisdiction in the United States District Court for the Northern District of Oklahoma.

Asserted ground of federal jurisdiction in the United States District Court is diversity of citizenship between plaintiff and defendants and requisite amount in controversy.

The interpleader claim of Aetna was premised upon a theory that its obligation was either to pay the policy according to its terms or to return the premium paid. The obligation to return the premium was an obligation to the executor of the estate of petitioners' testatrix. This obligation was not an obligation due and owing to petitioners. Absent the executor, or any allegation showing his residence, jurisdiction in the federal court was not apparent on the face of the record. The executor on the face of the record was an indispensable party.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The discretionary power of the Supreme Court of the United States to issue its Writ of Certiorari under Rule 19 (b) is invoked on strong and urgent grounds of public policy. The record reveals arbitrary and unwarranted interference by a federal district judge with the lawful jurisdiction of the state court. The writ is warranted to prevent unseemly conflict between state and federal courts, and to confine the Federal District Court for the Northern District to limits established by law.

The Court of Appeals for the Tenth Circuit has so far sanctioned a departure from the accepted and usual course of proceedings by a lower court as to warrant exercise of the Supreme Court's power of supervision. It has decided a federal question in conflict with the applicable statutes of the United States and controlling Rules of Federal Procedure. Said court has decided an important question of federal law contrary to the conclusions of other circuits but which has not been and should be settled by this Court. The nature and consequences of these errors which warrant certiorari may be noted as follows:

I.

The Court of Appeals Misconstrued 28 U. S. C. 1335, 1397, and 2361.

The courts below ignored procedural provisions of 28 U. S. C. 2361. This statute does not by its terms authorize a district court to enter an injunction without notice or hearing. This section authorizes restraining "proceedings in any state * * * court * * * until further order

of court." The section requires that such order "be returnable at such time as the court or judge thereof directs" and expressly requires that such "district court shall hear and determine the case * * *."

By no logical process can this statute be construed to authorize a permanent injunction on oral application based on an unverified pleading and without notice.

In the Third Circuit it has been held that to justify the granting of a preliminary injunction there must be a showing of irreparable injury during pendency of the action. *Meiselmen Paramount Film Distribution Corp., et al.,* 180 F. 2d 94, and cases therein cited.

In the Seventh Circuit, the Court of Appeals has concluded that every order granting an injunction under the federal rules must set forth the reasons for issuance and in granting interlocutory injunction findings of fact and conclusions of law are mandatory. *Shannon, et al.,* v. *Retail Clerks, International Protective Assoc., et al.,* 128 F. 2d 553.

That court cited and relied upon *Public Service Commission* v. *Wisconsin Telephone Co.,* 289 U. S. 67, 53 S. Ct. 514, 77 L. ed. 1036, by this Court, and *National Popsicle Corporation* v. *Icyclair, Inc.,* (9th Cir.) 119 F. 2d 799.

In the Second Circuit it has been held that where affidavits on motion for preliminary injunction were vague on material issues and did not show irreparable damage would result, denial of a preliminary injunction was proper. *Huber Baking Co.* v. *Stroehmann Bros. Co., et al.,* 208 F. 2d 464.

II.

The Court of Appeals Disregarded Provisions of 28 U. S. C. 2283 and F. R. C. P. 22 and 65.

In construing and applying F. R. C. P. 22 (2), the Court of Appeals ignored that portion thereof which specifically provides that:

> "Actions under those provisions (28 U. S. C., Sections 1335, 1397, and 1361) shall be conducted in accordance with these rules."

By this proviso the Federal Rules of Civil Procedure generally were expressly made applicable to interpleader actions.

The advisory committee on rules regarding the last quoted paragraph, *supra*, said in part:

> "*By this paragraph all remedies under the statute are continued, but the manner of obtaining them is in accordance with these rules. For temporary restraining orders and preliminary injunctions under this statute, see Rule 65 (e).*"

Rule 65, F. R. C. P. (a), details the limited terms and conditions under which even temporary restraining orders may be granted, requiring notice unless specific facts are shown by affidavit or verified complaint that immediate and irreparable injury will result before notice can be served.

The rule specifically requires that every temporary restraining order procured without notice shall define the injury, state why it is irreparable, when it is returnable, and why the order was granted without notice. Restraining orders issued without notice by operation of law expire in not to exceed ten days absent certain exceptions not material here.

Failure to give defendant fair opportunity to present testimony prior to issuance of injunction and contrary to Federal Rules of Civil Procedure 52 (a) and 65 (b) was held reversible error in the Third Circuit in *Sims* v. *Greene*, 161 F. 2d 87.

In the same case that court held that notice in the federal rule prohibiting issuance of a preliminary injunction without notice implied opportunity to be heard, and that hearing required trial of issue of fact with opportunity to present evidence afforded both sides to the controversy. A preliminary injunction was held not authorized where there was not a finding that irreparable injury would result from its denial. Many like cases from other circuits are therein cited.

Where plaintiffs were not permitted to offer testimony on motion for preliminary injunction as contemplated by federal rule and as a result no findings of fact were made, failure to take evidence has been held reversible error in the Third Circuit. *City Line Center, Inc., et al.*, v. *Loew's, Inc., et al.*, 178 F. 2d 267.

Injunction Bond Jurisdictional.

The record affirmatively shows the injunction complained of was issued on oral application and without notice to petitioners, oral or written, and without evidence or bond. No pretense was made that Rule 65, F. R. C. P., was being observed in the United States District Court.

F. R. C. P. 65 expressly provides that no restraining order or preliminary injunction shall issue except upon giving security for payment of costs and damages. In the case at bar the injunction complained of was issued on the basis of allegations in the unverified Amendment to Com-

plaint filed June 23, 1954, wherein cause No. 87402, pending in the District Court of Tulsa County, was for the first and only time mentioned in any pleadings. While a $25,000 bond had been posted on April 16, 1954, to enjoin proceedings "on account of or pertaining to policy No. AN 33409 issued by Aetna * * *" no injunction had previously been issued to enjoin prosecution of this or any other suit against Aetna for damages for tort, especially a case wherein the conversion occurred and cause of action originated *before the policy was applied for or issued.*

In the Seventh Circuit, in *Chotz* v. *Freeman,* 204 F. 2d 764, the Court of Appeals held:

> "The trial court committed error in issuing the temporary restraining order without providing for security as required by Rule 65 (c) of the Federal Rules of Civil Procedure."

The Third Circuit has decided that in interpleader suits where a deposit of money was inappropriate because the money deposited represented the cash surrender value of the policy rather than the benefits payable under it and no bond was filed, the court was without jurisdiction to grant a preliminary injunction. *Edner* v. *Mass. Mut. Life Ins. Co., et al.,* 138 F. 2d 327.

The injunction herein complained of was therefore void for that it was issued without bond.

III.

Interpleader statutes and rules do not authorize federal courts to enjoin prosecution of tort actions for damages pending in the state courts.

The result of the injunction complained of is that petitioners are summarily enjoined by the federal court from

prosecuting in a state court of competent jurisdiction a suit at law for damages, actual and punitive, in the sum of $462,703.88. The procedure adopted denies them a forum in which to adjudicate their damage claim, and the right to jury trial, all without notice, hearing, or apparent cause, obviously denying them all due process of law.

28 U. S. C. 1335 vests United States District Courts with original jurisdiction of civil actions in the nature of interpleader in which "two or more adverse claimants of diverse citizenship * * * are claiming or may claim to be entitled to * * * money or property or to any one or more of the benefits arising by virtue of any certificate, policy or other instrument * * *," issued by an insurance corporation.

This section neither directly nor indirectly vests in United States District Courts power to enjoin *actions for damages* arising under a state statute for tort. Particularly is this so where it is not shown by any evidence or affidavit that the tort action has even a remote relation to benefits arising under the policy.

28 U. S. C. 2361 authorizes restraining "proceedings in any state * * * court affecting the * * * obligation involved in the interpleader action * * *." A suit to recover damages of $462,703.88 for the conversion of United States bonds on October 31, 1950, is not a suit for benefits under or affecting an annuity for $162,606 not issued until December 9, 1950, especially so in the absence of evidence.

28 U. S. C. 2283 was enacted by Congress in furtherance of an express public policy to specifically prevent needless friction between state and federal courts. *Toucey* v. *New York Life Ins. Co.*, (Iowa and Mo., 1941) 62 S. Ct. 139, 314 U. S. 118, 86 L. ed. 100, 137 A. L. R. 967; *Oklahoma Packing Co* v. *Oklahoma Gas & Electric Co.*,

(Okla., 1939) 60 S. Ct. 215, 309 U. S. 4, 84 L. ed. 537, rehearing denied 60 S. Ct. 465, 309 U. S. 693, 84 L. ed. 1034; *Hale* v. *Bimco Trading,* (Fla., 1939) 59 S. Ct. 526, 306 U. S. 375, 83 L. ed. 771; *United States* v. *Cain,* (D. C. Mich., 1947) 72 F. Supp. 897.

The section expresses the duty of "hands off" by federal courts in use of injunction to stay litigation in state courts. *Amalgamated Clothing Workers of America* v. *Richman Bros. Co.,* (C. A. Ohio, 1954) 211 F. 2d 449.

Prohibition under this section is not voided by framing injunction against litigant rather than the state court. *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* (Ohio, 1941) 61 S. Ct. 510, 312 U. S. 270, 85 L. ed. 826; *Maryland Casualty Co.* v. *Consumers Finance Service of Pa.,* (C. C. A. Pa., 1938) 101 F. 2d 514; *Georgia Power Co.* v. *Hudson,* (C. C. A., S. C., 1951) 49 F. 2d 66; *H. J. Heinz Co.* v. *Owens,* (C. A. Cal, 1951) 189 F. 2d 505, rehearing denied 191 F. 2d 257, certiorari denied 72 S. Ct. 294, 342 U. S. 905, 96 L. ed. 677, rehearing denied 72 S. Ct. 374, 342 U. S. 934, 96 L. ed. 606, among other cases

The sound public policy imposing severe restraints on the right to a restraining order or interlocutory injunction is well illustrated in an opinion of this Honorable Court by Mr. Chief Justice STONE (announced by Justice ROBERTS) in *Yakus* v. *United States,* 88 L. ed. 834, 321 U. S. 414, wherein it was concluded that even in suits in which the evidence clearly established right to a preliminary injunction, granting such relief was not strictly a matter of right, but that the court should balance the conveniences of the parties and possible injury to them and to the public. Adequacy of the amount, terms and conditions of the bond to afford protection in damages was considered material to the right to an injunction even where otherwise warranted.

In *Mallory S. S. Co.* v. *Thalheim, et al.,* 277 Fed. 196, the Second Circuit concluded that interpleader was not a remedy available to a wrongdoer to relieve it of the consequences of its wrong. The case involves specifically a claim that in interpleader the federal court might enjoin prosecution of suits for conversion to avoid multiplicity of actions. Quoting from Street's Equity Practice, Par. 429, that circuit concluded that interpleader did not authorize a court of equity to wrest jurisdiction from a court of law, and cited *Hipp* v. *Babin,* 19 How. 271, 15 L. ed. 633, by this, the Supreme Court of the United States.

The remedy of Aetna to establish in the state court, if such was the fact, that it did not convert the bonds as claimed by plaintiffs there, was plain, adequate and complete.

In *Texas* v. *Florida,* 306 U. S. 398-435, 83 L. ed. 817, this, the Supreme Court of the United States, has in substance determined that relief in the nature of interpleader is grounded upon the danger of injury because of the risk of multiple suits when the liability is single.

Obviously in the case at bar, Aetna's liability under its incontestable policy, payable to designated annuitants, is a liability wholly separate and apart from its liability to the estate of petitioner's testatrix for damages, actual and punitive, for the conversion of specified United States bonds. Aetna attempts by interpleader in the federal court to have that court assume jurisdiction to determine the merits of its defense in an action at law pending against it in the state court. Petitioners here assert that the federal court by the interpleader statutes is granted no such jurisdiction; that to recognize such jurisdiction, the federal court would, in the case at bar, deprive petitioners of any forum in which to adjudicate a major portion of their claim, particularly that portion which includes punitive damages.

Conclusion.

A diligent search fails to disclose any reported case wherein any court has decided that the interpleader statutes of the United States vest in a United States District Judge absolute and unlimited authority to enjoin, without notice, hearing, bond or a showing, oral or otherwise, of any urgency prosecution of a pending suit for damages in the state court on oral application, premised on an unverified Amendment to Complaint filed five months previously. Because of the refusal of the United States District Court to allow or permit petitioners a hearing, either in person or by counsel, no opportunity was afforded to present in the trial court any of the propositions of fact or law herein advanced.

As a result of the injunction complained of, prosecution of a suit authorized by state law in a state court of competent jurisdiction for recovery of damages in the sum of $462,703.88 has been stayed since the issuance of such injunction on November 22, 1954.

Apparently to prevent review of the proceedings on appeal, the injunction complained of was styled "Order Construing Restraining Order Heretofore Made." The so-called "Restraining Order Heretofore Made" had been entered April 16, 1954. The Amendment to Complaint, wherein cause No. 87402 was first mentioned in any pleading or any relief sought respecting it, was not filed until June 23, 1954. Obviously the United States District Court had not intended on April 16, 1954, to enjoin prosecution of a suit in the state court of which the court then had no knowledge unless from some oral representation *ex parte*. The injunction entered November 22, 1954, from which appeal was duly prosecuted, is unauthorized under the federal law, represents an abuse and misuse of judicial authority, an un-

warranted interference with the orderly administration of justice in the state courts, and promotes unseemly conflict between state and federal courts contrary to a sound public policy.

For the reasons stated, it is respectfully submitted that certiorari should issue.

GLENN O. YOUNG,
Sapulpa, Oklahoma,
Attorney for Petitioners.

GLENN A. YOUNG,
DAVID YOUNG,
JOHN W. YOUNG, and
H. K. GLUNT,
Of Counsel.

APPENDIX.

EXHIBIT 1.

Opinion of the United States Court of Appeals.

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT.

May Term—1955.

Filed, United States Court of Appeals, Tenth Circuit, Aug. 3, 1955; Robert B. Cartwright, Clerk.

Number 5056.

Leona Holcomb, individually; Leona Holcomb, as guardian of the person and estate of Donald George Fleming, a minor; Donald George Fleming, a minor; Edward Denham, Frank T. Denham, George Denham, Clarence M. Denham and Mary Jane Hopkins, Appellants *vs.* Aetna Life Insurance Company, a corporation, Appellee.

Appeal From the District Court of the United States for the Northern District of Oklahoma.

Glenn O. Young and Glenn A. Young (H. K. Glunt, David Young and John W. Young were with them on the brief) for Appellants Leona Holcomb, individually, Leona Holcomb, as guardian of the person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Ed Denham and Frank Denham.

Glenn O. Young and Glenn A. Young (John W. Young and David Young were with them on the brief) for Appellants George Denham, Clarence Denham, and Mary Jane Hopkins.

Robert J. Woolsey (Farmer, Woolsey, Flippo & Bailey, J. C. Farmer, Otho Flippo, and J. B. Bailey were with him on the brief) for Appellees.

Before BRATTON and MURRAH, Circuit Judges, and WALLACE, District Judge.

BRATTON, Circuit Judge:

This action in the nature of interpleader was instituted

in the United States Court for Northern Oklahoma by Aetna Life Insurance Company, sometimes hereinafter referred to as Aetna, against Leona Holcomb, individually and as guardian of the person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Leona Denham Holcomb, Frank T. Denham, Edward Denham, Clarence M. Denham,George N. Denham, Rufus Denham, Marion Denham, Lewis Denham, Marion Rettenmeyer, Frank X. Rettenmeyer, Raymond D. Rettenmeyer, Mary Jane Hopkins, and Ellen Cash.

It is alleged in the complaint and the amendment thereto, considered as a single pleading, that plaintiff is a corporation organized under the laws of Connecticut; that the defendants Leona Holcomb, individually and as guardian of the person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Edward Denham, Frank T. Denham, George N. Denham, Leona Denham Holcomb, and Mary Jane Hopkins are residents and citizens of Oklahoma; that the remaining defendants are residents and citizens of states other than Connecticut and Oklahoma; that more than $3,000 exclusive of interest and costs is in controversy; and that the defendants who are residents and citizens of Oklahoma, on one hand, claim adversely to those who are residents and citizens of other states, on the other hand. It is further alleged that plaintiff is engaged in the insurance business; that it entered into a contract of annuity insurance with Rosa B. Wright Rettenmeyer, for which the annuitant paid a premium of $162,606; that by the terms of such contract of insurance, plaintiff was to pay to Rosa B. Wright Rettenmeyer $1,000 per month during the remainder of her life; that upon her death, plaintiff was to pay $1,000 per month to her husband, Joseph A. Rettenmeyer; and that upon the death of Joseph A. Rettenmeyer, plaintiff was to pay to Rufus Denham, Marion Denham, Lewis Denham, Marion Rettenmeyer, Frank X. Rettenmeyer, Raymond D. Rettenmeyer, and Ellen Cash, each $123.07 monthly, and pay to Frank T. Denham, Edward Denham, Clarence M. Denham, George N. Denham, Leona Denham Holcomb, and Mary Jane

Hopkins, each $23.08 monthly, until the amount paid should equal the amount of the premium. It was further alleged that Rosa B. Wright Rettenmeyer died testate; that her will was admitted to probate in the County Court of Creek County, Oklahoma; that First National Bank & Trust Company of Oklahoma City, Oklahoma, sometimes hereinafter referred to as the Bank, was appointed executor; and that Joseph A. Rettenmeyer died. It is further alleged that in the probate proceeding involving the estate of Rosa B. Wright Rettenmeyer, deceased, Leona Holcomb, individually and as guardian of the person and estate of Donald George Fleming, a minor, Ed Denham, Frank Denham, George Denham, Clarence Denham, and Mary Jane Hopkins, filed a pleading in the nature of a petition in intervention in which they attacked the validity of the contract of annuity insurance and sought for the benefit of the estate to recover as against Aetna and the Bank the $162,606 which had been paid as a premium thereon; that the parties thus intervening in the probate proceeding filed in the District Court of Creek County, Cause No. 29092 against Aetna, the Bank, and others; that the same complaining parties instituted in the District Court for Tulsa County, Oklahoma, Cause No. 87402 against Aetna, the Bank, and others; that in both cases then pending in the state district courts, the complainants attacked the validity of the contract of annuity insurance and sought to recover for the benefit of the estate of Rosa B. Wright Rettenmeyer the amount of the premium paid for such contract; that the contract of annuity insurance was purchased by Rosa B. Wright Rettenmeyer with the proceeds of the United States bonds mentioned and referred to in the petition in the case in the District Court of Creek County; and that payments in the aggregate amount of $39,000 were made under the contract of annuity insurance to Rosa B. Rettenmeyer or to her duly appointed guardian during her life and to Joseph B. Rettenmeyer after her death. It is further alleged that the beneficiaries named in the contract of annuity insurance who are not parties to Cause No. 29092 and Cause No. 87402, namely Raymond D.

Rettenmeyer, Frank X. Rettenmeyer, Lewis Denham, Marion Denham, Rufus Denham, and Ellen Cash, are claiming and may claim to be entitled to the monthly payments as provided in such contract of insurance after the death of Joseph A. Rettenmeyer; that by reason of such divergent claims a conflict has arisen as to which of the defendants are entitled to payment of their respective claims; and that plaintiff has been and may be subjected to vexatious and multitudinous suits and be further subjected to multiple payments in the event all of the defendants should prevail upon their claims against plaintiff. A copy of an order entered by the county court declining to direct the executor to take steps to recover for the estate the amount which had been paid as the premium on the contract of annuity insurance, copies of the petition and the amended petition in Cause No. 29092, and a copy of the petition in Cause No. 87402, are attached to the complaint and made parts thereof. The prayer of the complaint is that the defendants be restrained from instituting any action against plaintiff, or from prosecuting any pending action or actions against plaintiff, for the recovery of the proceeds of the contract of annuity insurance, or any part thereof, until the further order of the court; that the defendants be required to interplead and settle among themselves their rights to the amount of such contract of insurance; that plaintiff be discharged from all liability in the premises except to the person whom the court should adjudge entitled to the amount of such contract of insurance; and that plaintiff have all other equitable relief to which it was entitled.

The court entered an order restraining and enjoining the defendants from instituting or prosecuting further any suit in a state court, and from instituting or prosecuting any suit or proceeding in any United States Court, on account of or pertaining to the contract of annuity insurance, reserving unto the defendants however the right to appear in this cause and assert any claim which they may have. Motions were filed to vacate the injunctive order, to strike certain parts of the complaint, and to dismiss the action.

And answers were filed. The court entered an order vacating the temporary restraining order previously entered in so far as it restrained any judicial proceedings or actions of any kind against any one except Aetna. In all other respects, the motions were denied. The court entered a third order. It recited that confusion had arisen in respect to the two previously entered orders. And it provided among other things that in order to clarify and construe such previously entered orders, the defendants were restrained and enjoined as against Aetna from instituting or further prosecuting any suit or proceeding on account of or pertaining to the contract of annuity insurance, including particularly Cause No. 29092, pending in the District Court of Creek County, and Cause No. 87402 pending in the District Court of Tulsa County. The defendants Leona Holcomb, individually and as guardian of the person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Frank T. Denham, Edward Denham, Clarence M. Denham, George N. Denham, and Mary Jane Hopkins, appealed. The defendants Rufus Denham, Lewis Denham, Marion Denham, Frank X. Rettenmeyer, Raymond D. Rettenmeyer, Marion Rettenmeyer, and Ellen Cash did not appeal.

The order appealed from is challenged on the ground that the issuance of the injunction constituted a violation of 28 U. S. C. A., Sec. 2283, which provides that a court of the United States may not grant an injunction to stay a proceeding in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect and effectuate its judgments. The statute embodies the long standing wholesome policy of avoiding needless friction between state and federal courts. *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4; *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118; *Porter* v. *Dicken*, 328 U. S. 252. But it is to be observed that the interdiction contained in the statute upon the power of a court of the United States in respect to the issuance of an injunction is not absolute and without exception. The statute contains three separate and distinct exceptions from

its sweep. One of such exceptions is instances in which Congress has expressly authorized the granting of an injunction to restrain parties from prosecuting a proceeding in a state court. In virtue of such exception, the statute does not forbid the issuance of an injunction to restrain the prosecution of an action in a state court where its issuance has been expressly authorized by Act of Congress.

While denominated an order construing the restraining orders previously entered in the case, the effect of the order in question is to enjoin the defendants from further prosecuting as against Aetna two specified and particularized cases pending in state courts. And entry of the order is forbidden by 28 U. S. C. A., Sec. 2283, unless it is an order falling within the purview of an authorizing Act of Congress. It therefore becomes appropriate to inquire whether the order does fall within the scope and meaning of an Act of Congress authorizing its issuance. In approaching the inquiry, attention must be focused upon two statutes. In presently pertinent part, 28 U. S. C. A., Sec. 1335, provides that the district courts shall have original jurisdiction of civil actions of interpleader or in the nature of interpleader filed by any corporation having in its custody or possession money of the value of $500 or more, or having issued a certificate, or policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment of money of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if two or more adverse claimants, of diverse citizenship as defined in Section 1332 of the title, are claiming or may claim to be entitled to such money, or to any one or more of the benefits arising by virtue of any certificate, policy, or other instrument, or arising by virtue of any such obligation, and if plaintiff has deposited in the registry of the court such money or the amount due under such obligation, there to abide the judgment of the court, or has given bond payable to the clerk in such amount and with such surety as the court or judge may deem proper, conditioned upon compliance by plaintiff with the future order or judg-

ment of the court; and that such action may be entertained although the title or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another. And in presently pertinent part, 28 U. S. C. A., Sec. 2361, provides that in any civil action of interpleader or in the nature of interpleader under Section 1335 of the title, the district court may enter its order restraining the defendants from prosecuting any proceeding in any state court affecting the property, instrument, or obligation involved in the interpleader action until the further order of the court. The order, entered in an action in the nature of interpleader, is one expressly authorized by Act of Congress and therefore does not contravene 28 U. S. C. A., Sec. 2283.

It is urged that the trial court was without jurisdiction of the cause and hence the restraining order in question is infirm for the reason that there is no identity of property, instrument, or obligation between the conversion actions in the state courts and this action in the nature of interpleader. The argument is that the two actions in the state court are straight suits for conversion of United States bonds; that no reference is made in the amended petition in the action in the District Court of Creek County, or in the original petition in the action in the District Court of Tulsa County, to the contract of insurance or to the premium paid therefor; and that therefore there is complete want of identity of property, instrument, or obligation between such suits and this action. The further argument is that since the contract of insurance contained an incontestable provision, the outcome of the cases in the state courts and the obligation of Aetna under the contract of insurance are wholly unrelated matters. It is said that whether Aetna prevails or loses in the state court, it still must make payments under the contract of insurance; and that therefore Aetna is not being subjected to vexatious and multitudinous claims. Rule of Civil Procedure 22, 28 U. S. C., provides that persons having claims against plaintiff may be joined as defendants and required to interplead when their claims are such that plaintiff

is or may be exposed to double or multiple liability; that it is not ground for objection to the joinder that the claims of the several claimants do not have a common origin or are not identical but are adverse and independent of each other, or that plaintiff avers that he is not liable in whole or in part to any or all of the claimants; and that the remedy therein provided is in addition to and in no way supersedes or limits the remedy provided by 28 U. S. C. A., Secs. 1335, 1397, and 2361. The substance of the cause of action pleaded in the complaint in this case is that the premium which Aetna received for the contract of insurance was paid with the proceeds of certain United States bonds; that in each of the cases pending in the state courts plaintiffs—being part of the defendants here—pleaded that certain United States bonds were wrongfully converted from Rosa B. Wright Rettenmeyer; that the bonds from which the proceeds were used to pay the premium on the contract of insurance and the bonds referred to in the actions in the state courts are the same bonds; and that in the event plaintiffs should prevail in the state courts and the annuitants under the contract of insurance who are not parties to the actions in the state courts should also prevail upon their claims for benefits under the contract of insurance, Aetna will be subjected to double payment for a single liability. Stated otherwise, the cause of action as pleaded in the complaint is that two claims are being asserted against Aetna; and that in the event both are pressed with success, Aetna will be compelled to make double payment in connection with a single liability. If plaintiffs should prevail in either action in the state court, the effect will be to require or compel Aetna to part with the premium which it received for the contract of insurance. And in the event that after parting with such premium, Aetna should be compelled to make or continue to make payments to annuitants under the contract of insurance, it will be subjected to multiple payments. If Aetna is under only a single liability, the claim asserted against it in the state courts and the claim of annuitants for payment or continued payment of specified sums under the terms of the

contract of insurance necessarily in contemplation of law negate each other and are adverse each to the other. The two claims being asserted against Aetna are not completely unrelated to each other in the sense that they may not be pleaded as the basis for equitable relief in the nature of interpleader. And whether Aetna is under only a single liability, whether the requirement in effect that it surrender back or part with the premium which it received for the contract of insurance would operate to terminate or extinguish such contract with no further liability on the part of Aetna to make payments to annuitants, whether Aetna is being and will be subjected to vexatious claims which negate each other, and whether it is in danger of being compelled to make multiple payments in connection with a single liability, are questions which cannot be adjudicated with finality and conclusiveness as to all parties in interest in either of the cases pending in the state courts. They are justiciable questions appropriate for determination in an action in the nature of interpleader. *Texas* v. *Florida,* 306 U. S. 398; *Standard Surety & Casualty Co.* v. *Baker,* 105 F. (2d) 578; *Equitable Life Assurance Society of the United Sates* v. *Maloney.* 85 F. Supp. 212.

Another contention presented is that the injunction should be vacated because appellants cannot make their claim of conversion in this action in the absence of the executor of the estate of Rosa B. Wright Rettenmeyer, a co-citizen of appellants whose joinder would defeat jurisdiction. In the two actions in the state courts, the Bank was sued both as a banking corporation and as executor of the estate of Rosa B. Wright Rettenmeyer. The Bank, as a corporation, filed in this action in the nature of interpleader its motion for leave to intervene together with a tendered complaint in intervention. But in filing the motion and tendering the complaint, the Bank acted only in its capacity as a banking corporation. It did not purport to act in its capacity as executor. But the presence of the Bank as executor is not essential to the jurisdiction of the court. Aetna is a

party. The liability for conversion asserted against Aetna in the state courts is joint and several. And that liability may be asserted against Aetna in this action without the Bank as executor being a party. We fail to perceive that the absence of the Bank in its capacity as executor as a party to the action constitutes any impediment to the jurisdiction of the court.

Two further contentions advanced for reversal of the order may be considered together. One is that the action in the nature of interpleader is governed by equitable principles; that Aetna stands in the position of a joint tort feasor; that it does not come into court with clean hands; and that equity will not extend relief to a joint tort feasor against the consequences of its own wrong. The other is that the injunction should be vacated because Aetna is not acting in good faith in seeking the interpleader in which the injunction was issued. A proceeding in the nature of interpleader is one in equity and is governed by equitable principles. *Texas* v. *Florida, supra.* A tort feasor cannot obtain protection in an action in the nature of interpleader against the consequences of its own wrong. *Mallory Steamship Co.* v. *Thalheim,* 277 F. 196. And a complainant in an action in the nature of interpleader must act in good faith. But the facts pleaded in the complaint do not disclose a tort on the part of Aetna. Neither does the complaint disclose on its face any lack of good faith on the part of Aetna in instituting the action. While the position of the appealing defendants has been throughout that Aetna converted or participated in the conversion of the bonds belonging to Rosa B. Wright Rettenmeyer and that it has not acted in good faith in instituting the action, the cause has not been tried and there has not been a finding or determination of tort on the part of Aetna or any lack of good faith on its part in the institution of the action. And unless or until such issues have been tried, the contentions presently presented on appeal are premature.

Next comes the contention that the injunction should be vacated because Aetna made no bond for its issuance and did not deposit the amount of the pretended res which it alleges to be the subject of the hypothetical controversy, and that it secured the injunction without notice, hearing, or evidence, in violation of due process. Aetna submitted a bond in the sum of $25,000, conditioned as required by 28 U. S. C. A., Sec. 1335. The record before us does not indicate that any order was entered in advance fixing the amount of the bond. But the court approved the tendered bond, and that approval brought within its operative scope approval of the amount and adequacy of the bond and the sufficiency of the surety subscribing thereto. The order appealed from was entered long after the filing of the bond, and no new or additional bond was filed as a prerequisite to the entry of such order. But the filing of a new bond was not necessary. The defendants may have resort to the bond on file for any damage up to the amount of such bond which they may suffer in consequence of the improvident entry of the restraining order from which the appeal was perfected. Rule of Civil Procedure 65, 28 U. S. C., provides in part that no preliminary injunction shall be issued without notice to the adverse party; and that no temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. And it further provides among other things that the rules do not modify the provisions of 28 U. S. C., Sec. 2361, relating to preliminary injunctions in actions in the nature of interpleader. No written notice was given in advance of the entry of the order from which the appeal was taken. But the appealing defendants had appeared and pleaded in the case, and they were advised in open court that the order would be entered. Entry of the order in such circumstances did not contravene Rule 65, *supra*, or the exactions of due process.

The remaining contention which merits discussion is that the court abused its discretion in enjoining the defendants from prosecuting the two cases in the state courts. Judicial discretion in a case of this kind is the power exercised by the court to determine a question to which no strict rule of equity is applicable. It is a vested power not exercised in an arbitrary, capricious, or willful manner but with due regard for that which is equitable and just under the circumstances. It is action directed by the court's reason and conscience to a just result. *Smaldone* v. *United States,* 211 F. 2d 161. And whether action constitutes an abuse of discretion depends upon the particular circumstances. Viewing the contention in the light of these blueprinted general principles, we are unable to say that restraining the defendants until the further order of the court from prosecuting the actions in the state courts constituted an abuse of discretion. On the contrary, we share the view that entry of the restraining order lay within the range of discretion of the trial court.

Other contentions are presented. We have examined them and think they are without merit.

The order from which the appeal was perfected is AFFIRMED.

EXHIBIT 2.

Judgment of the United States Court of Appeals.

"Forty-third day, May Term, Wednesday, August 3rd, 1955.

Before Honorable Sam G. Bratton and Honorable Alfred P. Murrah, Circuit Judge, and Honorable W. R. Wallace, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed " (Tr. 19)

EXHIBIT 3.

Order of the United States Court of Appeals.

"(By order of August 22, 1955, time for appellants' petition for rehearing was extended for an additional five days.)" (Tr. 19)

EXHIBIT 4.

Petition of Appellants for Rehearing.

"Filed United States Court of Appeals, Tenth Circuit, Aug. 25, 1955; Robert B. Cartwright, Clerk."

EXHIBIT 5.

Order of the United States Court of Appeals.

"(By order of September 6, 1955, leave was granted to file an amendment to appellants' petition for rehearing within ten days.)" (Tr. 48)

EXHIBIT 6.

Amendment to Petition for Rehearing.

"Filed United States Court of Appeals, Tenth Circuit, Sep. 14, 1955; Robert B. Cartwright, Clerk."

EXHIBIT 7.

Order: Appellants' Petition for Rehearing and Amendment—Denied.

"Thirteenth day, September term, Thursday, September 29th, 1955.

Before Honorable Sam G. Bratton and Honorable Alfred P. Murrah, Circuit Judges, and Honorable W. R. Wallace, District Court.

This cause came on to be heard on the petition of appellants for a rehearing herein and amendment thereto and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition and amendment thereto be and the same are hereby denied." (Tr. 65)

EXHIBIT 8.

Order of the United States Court of Appeals.

"(On October 11, 1955, an order of the United States Court of Appeals was entered staying the mandate of the said court for a period of thirty days from that day, under provision of paragraph 3 of rule 28 of said court.)" (Tr. 65)

EXHIBIT 9.

Order of November 10, 1955, of the United States Court of Appeals.

"This cause came on to be heard on the motion of appellants for a further stay of the mandate herein.

"On consideration whereof, it is now here ordered that said motion be and the same is hereby granted and that no mandate of this court issue herein on or before December 26, 1955, and that, if within said period of time there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court." (Tr. 67)

EXHIBIT 10.

Amendment to Complaint for Interpleader.

"Comes now the plaintiff and with leave of court having been obtained amends its original complaint for interpleader filed herein and alleges and states:

1. That the annuity contract mentioned in its original complaint, No. AN 33409 attached to the complaint as Exhibit "1," was purchased by Mrs. Rosa B. Wright Rettenmeyer with the proceeds of the United States Government bonds mentioned in paragraph 13 of the amended petition filed by Leona Holcomb, *et al.*, in Case No. 29092 in the District Court of Creek County and mentioned in paragraph 14 in the original petition filed by the plaintiff Leona Holcomb, *et al.*, in Case No. 29092.

2. That the said Rosa B. Wright Rettenmeyer signed the application for said insurance and was competent when she signed said application and specified the terms and provisions of said annuity contract and that thereafter she ratified said contract by accepting the annuity payments during her lifetime and prior to the date she was adjudicated incompetent; that after she was adjudged incompetent payments were then made to her duly authorized and appointed guardian of her estate and then on her death payments were made to Joe Rettenmeyer; and that the sum total of all of said payments amounts to the sum of $39,000.

3. Plaintiff alleges further that Leona Holcomb, individually; Leona Holcomb, as guardian of the person and estate of Donald George Fleming, a minor; Ed Denham, Frank Denham, George Denham and Clarence Denham and Mary Jane Hopkins have attached the validity of said annuity contract, not only as alleged in the complaint in interpleader filed herein but also in Case No. 6442 in the County Court of Creek County, In the Matter of the Estate of Rosa B. Wright Rettenmeyer, the said defendants have challenged the validity of said contract; in said cause the said Leona Holcomb and the other above named defendants filed on September 4, 1953, a complaint in intervention, a response to application and complaints for citations, in which they allege as follows:

That notwithstanding the express terms of said antenuptial contract and the terms of said will made while said Rosa B. Wright was possessed of all her mental and physical faculties, after she had become paralyzed and physically and mentally incapacitated by an extensive cerebral hemorrhage, said Joseph A. Rettenmeyer procured from her separate funds one annuity contract ostensibly to Donald George Fleming, a minor, but in which said Joseph A. Rettenmeyer holds for life the right to surrender the same for cash, in the face amount of $33,000. Within a month after procuring this first annuity contract with her funds, and while she was still so incapacitated, said Joseph A. Retten-

meyer secured another annuity contract in the face amount of $162,000, paying to him, the said Joseph A. Rettenmeyer, $1,000 per month. That both such instruments were secured while said Joseph A. Rettenmeyer was acting as and legally obligated to perform the duties and maintain the loyalty of the agent, attorney and fiduciary of Rosa B. Wright."

Further that in said complaint in intervention it was alleged in the prayer for relief as follows:

"3. That after said Joseph A. Rettenmeyer has made disclosure of all additional available evidence concerning the things and matters related in this response and complaint and in executor's application be thoroughly investigated under oath and said executor ordered to institute suit as requested by respondents and complainants and that said executor make additional items of inventory and where necessary bring suit to recover all omitted property belonging to said estate including moneys expended for the bonds and annuity contracts specified in said executor's application, the property omitted from the final account of the guardian of the estate of Rosa B. Wright Rettenmeyer, deceased, and all moneys or property secured or sought by said Joseph A. Rettenmeyer in violation of the afore described ante-nuptial contract and the last will and testament and codicils made thereunder and all personal gains by him made in breach of his fiduciary relationship to said decedent."

4. Plaintiffs allege further that in said cause No. 6442 the said Leona Holcomb and the others heretofore named again attacked the validity of said annuity contract No. AN 33409 by filing on September 21, 1953, in said County Court of Creek County an amended complaint in intervention, amended response to application, and complaints for citation; that in said amended complaint in intervention it was alleged as follows:

"That notwithstanding the express terms of said ante-nuptial contract and the terms of said will made while the said Rosa B. Wright was possessed of all her mental and

physical faculties, after she had become paralyzed and physically and mentally incapacitated by an extensive cerebral hemorrhage, said Joseph A. Rettenmeyer procured from her separate funds one annuity contract ostensibly to Donald George Fleming, a minor, but in which said Joseph A. Rettenmeyer holds for life the right to surrender the same for cash, in the face amount of $33,000. Within a month after procuring this first annuity contract with her funds, and while she was still so incapacitated, said Joseph A. Rettenmeyer secured another annuity contract in the face amount of $162,000 paying to him, the said Joseph A. Rettenmeyer, $1,000 per month. That both such instruments were secured while said Joseph A. Rettenmeyer was acting as and legally obligated to perform the duties and maintain the loyalty of the agent, attorney and fiduciary of said Rosa B. Wright."

In said amended complaint in intervention the said Leona Holcomb and the above named defendants requested and prayed among other things that the executor, First National Bank and Trust Company of Oklahoma City, immediately commence suit to recover the foregoing assets and unless same was done that the executor be discharged without compensation and a new administrator with will annexed be appointed.

5. Plaintiff alleges that the said Leona Holcomb, *et al.*, again attacked the validity of annuity contract in Case No. 87402 in the District Court of Tulsa County, State of Oklahoma, styled Mary Jane Hopkins, *et al., vs.* Aetna Life Insurance Company, *et al.;* a copy of said petition filed in the District Court of Tulsa County is hereto attached, marked Plaintiff's Exhibit '5.'

Wherefore, plaintiff prays judgment in accordance with the prayer for relief in its original complaint filed herein.

J. C. Farmer,
R. J. Woolsey,
Otto Flippo,
J. B. Bailey.

Filed with exhibits June 23, 1954."

EXHIBIT 11.

Exhibit 5 to Amendment to Complaint for Interpleader.

PETITION. (Caption and signature omitted.)

Come now the plaintiffs, Mary Jane Hopkins, *nee* Wright, Leona Holcomb, Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Ed Denham, Frank Denham, George Denham and Clarence Denham, and for cause of action against the defendants Aetna Life Insurance Company, F. E. Pence, Joseph A. Rettenmeyer, in person and as guardian, agent, and attorney in fact for Rosa B. Wright, later Rettenmeyer, deceased, Francis X. Rettenmeyer, Raymond D. Rettenmeyer, Marion Rettenmeyer, The First National Bank and Trust Company of Oklahoma City, a corporation, as such and as Executor of the Estate of Rosa B. Wright Rettenmeyer, deceased, and its officers and agents, Virgil F. Sprankle, Grover D. Strother, A. N. Murphey and Justin W. Faherty, allege and state:

I. The plaintiff Mary Jane Hopkins, *nee* Wright, is the daughter of the said Rosa B. Wright (later Rettenmeyer). That plaintiffs Leona Holcomb, *nee* Denham, Ed, Frank, George and Clarence Denham were brought up in the home of the late Rosa B. Wright (later Rettenmeyer) and her husband, the late Cal Wright, both of whom are deceased. Rosa B. Wright was their aunt and foster mother. Donald George Fleming, a minor, is the ward of said Rosa B. Wright and her grand nephew. Said plaintiffs hereinafter referred to as The Denham Heirs are all devisees under the Last Will and Testament of Rosa B. Wright Rettenmeyer, deceased, attached hereto and made a part hereof as "Exhibit A."

II. The defendant, The First National Bank and Trust Company of Oklahoma City, is a corporation duly organized and existing as such under the laws of the State of Oklahoma, engaged in general banking and in business as trustee and custodian for hire of the property of others, including the public generally. Said The First National Bank and Trust Company of Oklahoma City, in addition to its

activities hereinabove recited, advertises for business as and represents itself to be specially qualified to serve as administrator of the estate of deceased persons and executor of their wills. For the purpose of obtaining business of this character it retains and employs attorneys and agents who solicit and attempt to obtain for it appointments involving fidelity and trust as executors and administrators. At all times hereinafter complained of, said defendant The First National Bank and Trust Company of Oklahoma City was the duly designated Executor of the Estate of Rosa B. Wright Rettenmeyer, deceased, under the terms and conditions of her said Last Will and Testament. Subsequent to the death of Rosa B. Wright Rettenmeyer, said The First National Bank and Trust Company of Oklahoma City was by order of the County Court of Creek County, Oklahoma, in a proceeding therein instituted by it, designated and appointed executor of the will of said Rosa B. Wright Rettenmeyer, deceased, which position of trust said corporation now occupies. A copy of said Letters Testamentary are hereto attached as a part hereof and marked "Exhibit B."

III. The defendants Virgil F. Sprankle, Grover D. Strother, A. N. Murphey and Justin W. Faherty, were at all times hereinafter complained of officers and agents of said The First National Bank and Trust Company of Oklahoma City, a corporation, in its capacity as such and as the designated Executor of the Estate of Rosa B. Wright, later Rettenmeyer, deceased; that they were at all times herein referred to acting within the scope of their employment as such officers and agents and their acts were the acts of said corporation, The First National Bank and Trust Company of Oklahoma City.

IV. That at all times hereinafter complained of one Joseph A. Rettenmeyer was the second husband, attorney in fact, agent and/or guardian of the aforesaid Rosa B. Wright (later Rettenmeyer) and a devisee under the terms of her aforesaid Last Will and Testament to the extent of an undivided one-eleventh interest in her estate. Said

Joseph A. Rettenmeyer was the step-father of plaintiff Mary Jane Hopkins, *nee* Wright. At all times hereinafter complained of and in committing the torts and converting the property hereinafter set forth, said Joseph A. Rettenmeyer acted in his own behalf and in behalf of and for his own children by another marriage, defendants Francis X. Rettenmeyer and Raymond Rettenmeyer, and his daughter-in-law defendant Marion Rettenmeyer; and said last named three defendants at all such times acted by and through said Joseph A. Rettenmeyer.

Copies of the three powers of attorney and the Letters of Guardianship under and behind which said defendant Joseph A. Rettenmeyer so acted and converted the property of said Rosa B. Wright are attached hereto as a part hereof and marked "Exhibits C, D, E, and F," respectively.

V. That the defendant Aetna Life Insurance Company is a foreign insurance company, duly incorporated as such and engaged in business in the State of Oklahoma. That the defendant F. E. Pence is and was at all times hereinafter complained of an agent of said Aetna Life Insurance Company, occupying a position as General Agent of said company within and for the State of Oklahoma and acting within the terms and scope of his agency as such; that said F. E. Pence had long posed as a personal friend and private counsellor to said Rosa B. Wright (later Rettenmeyer).

VII. Plaintiffs aver further that upon the death of her first husband, the aforesaid Cal Wright, his widow, the aforesaid Rosa B. Wright (later Rettenmeyer) inherited under the terms of his Last Will and Testament an estate having a value in excess of $800,000.00. At about the time said estate was distributed to her, the defendant Joseph A. Rettenmeyer proposed to marry her; that since the said Joseph A. Rettenmeyer was then about 68 years old and the said Rosa B. Wright was then herself about 67 years, she, the said Rosa B. Wright, fearing his object to be her property rather than her affections, required said Joseph A. Rettenmeyer to make and execute an ante-nuptial agreement, a

true and correct copy of which is hereto annexed and made a part hereof as "Exhibit G," under and by virtue of the terms of which he solemnly and legally renounced and waived any claims to her property and estate growing out of or resulting from said marriage; that she thereafter made and executed in due form the Will heretofore set forth as Exhibit A, making ample provision for the said Joseph A. Rettenmeyer in the event of her death by devising to him as aforesaid an undivided one-eleventh of her estate, and devising to plaintiffs a just and equitable portion thereof, all as is more particularly set forth under the terms of said Will; plaintiffs further allege that certain codicils were thereafter executed to said Will, the same being identified as Exhibits H and I and made a part hereof. That neither of said codicils altered or modified the proportionate share and part of said estate devised to each devisee.

VIII. That subsequent to the execution of said antenuptial agreement and said Will and said codicils, and prior to her death, the said Rosa B. Wright (later Rettenmeyer) became incompetent and incapable as the result of weakness of mind and body of seeing after and attending to her own property and affairs; that as the result thereof she was obliged to and did make and execute in favor of said Joseph A. Rettenmeyer certain Powers of Attorneys, copies of which are heretofore appended as Exhibits C, D and E, under and by virtue of the terms of which she turned over and delivered to him, subject to the limitations and restrictions therein set forth, control of her property and estate; that thereafter and on or about the 30th day of July, 1952, said Joseph A. Rettenmeyer instituted in the County Court of Creek County, Oklahoma, a proceeding to have said Rosa B. Wright (Rettenmeyer) adjudged incompetent, and to have himself made guardian of her person and estate; that a copy of the petition therein is hereto appended as a part hereof as Exhibit J; that under an order of the County Court of Creek County, a copy of which is hereto appended and made part hereof as Exhibit K, he was designated and appointed

her guardian, and as such assumed direction and control over her person under Letters of Guardianship, a copy of which is appended as a part hereof as Exhibit F.

IX. Plaintiffs allege further that said ante-nuptial agreement and said Will and all codicils thereto were prepared by or under the direction of an attorney, to-wit, John Embry, who was attorney for the late Rosa B. Wright (later Rettenmeyer), and in whom she reposed special confidence and trust, and by members of the law firm with which he was associated, that is to say, the law firm of Embry, Johnson, Crowe, Tolbert and Boxley; plaintiffs further say that said attorneys and said law firm were attorneys also for defendant Aetna Life Insurance Company, F. E. Pence and Joseph A. Rettenmeyer as agent of Rosa B. Wright (later Rettenmeyer) under the terms of the agency hereinabove referred to.

X. Plaintiffs say further that at the time of the appointment of said Joseph A. Rettenmeyer as Attorney in Fact, agent and custodian of her property aforesaid, said Rosa B. Wright (later Rettenmeyer) owned and held U. S. Government Bonds, more particularly described as follows:

U. S. Treasury Bonds 2-7/8ths—1955-1960.

No. 10065 E	$10,000.00
No. 10066 F	$10,000.00
No. 10067 H	$10,000.00
No. 10068 J	$10,000.00
No. 10069 K	$10,000.00
No. 10070 L	$10,000.00
No. 10071 A	$10,000.00
No. 10072 B	$10,000.00
No. 10073 C	$10,000.00
No. 10074 D	$10,000.00
No. 10075 E	$10,000.00
No. 10076 F	$10,000.00
No. 8730 L	$ 5,000.00

Series G, June, 1944:

No. X448354 G	$10,000.00
No. X448355 G	$10,000.00
No. X448356 G	$10,000.00
No. X448357 G	$10,000.00
No. X448358 G	$10,000.00
No. X448359 G	$10,000.00

Said bonds had been by her entrusted to the care and custody of the defendant The First National Bank and Trust Company, a corporation, and its officers and agents, defendants Virgil F. Sprankle, Grover D. Strother, A. N. Murphey and Justin W. Faherty, both in the capacity of trustees for hire and as the designated Executor of the Will of said decedent. Said bonds had a market value of $191,864.64, and were producing interest, which was accruing to her use and benefit in the sum of $8,687.50 per year.

XI. Plaintiffs aver and allege that under the terms of the Will of the late Rosa B. Wright (later Rettenmeyer) and said Ante-nuptial agreement hereinabove referred to, in the event of the death of the said Rosa B. Wright said bonds, or the value thereof, together with any unexpended portion of the increments and the profits therefrom, would have been divided one-eleventh to Joseph A. Rettenmeyer and seven-elevenths to the plaintiffs herein, conformable to the terms of the Will and codicils hereinabove referred to. Plaintiffs aver and state that all said defendants and the attorneys hereinabove referred to were fully informed of the facts and circumstances herein set forth.

XII. It was the duty of each of the defendants hereinabove named to preserve intact and with fidelity and care said property and the income and increment therefrom for the use and benefit of said Rosa B. Wright (later Rettenmeyer) in her lifetime and for disposition conformable to the terms of said ante-nuptial contract, her Last Will and Testament and the codicils thereto in event of her death.

XIII. Plaintiffs further say that in breach of trust and violation of law, said defendants, acting jointly and severally and in furtherance of a common design and purpose, did on or about the 31st day of October, 1950, secretly and surreptitiously enter the safety deposit box of said Rosa B. Wright in The First National Bank and Trust Company of Oklahoma City, and without authority of law wrongfully and illegally take, steal and carry away therefrom the U. S. Government Bonds hereinabove set forth and did wrongfully endorse, or cause to be endorsed thereon, an "X" purporting to be an act of said Rosa B. Wright Rettenmeyer, procure the cash value thereof, and convert the same to their own use and benefit to the damage and detriment of said Rosa B. Wright Rettenmeyer, her heirs, devisees and assigns, in the sum of $191,864.64.

XIV. Plaintiffs aver further that said acts were done surreptitiously and secretly; that the knowledge of said transactions was secreted from said Rosa B. Wright Rettenmeyer in her lifetime; that if she had any notice or knowledge thereof, which is by plaintiffs specifically denied, she was so kept, controlled and dominated by the defendants, their agents and servants, and so incapacitated in mind and body and incapable by virtue of guardianship, Powers of Attorney, and secret control of her own attorneys by said defendants that she was powerless to act in her own behalf.

XV. Plaintiffs aver and allege that said Rosa B. Wright Rettenmeyer departed this life on or about the 13th day of December, 1952. Thereafter the defendant, The First National Bank and Trust Company of Oklahoma City, Oklahoma, a corporation, by said law firm of Embry, Crowe, Tolbert, Boxley and Johnson, immediately instituted a proceeding for the appointment of said defendant bank as executor of said estate; that by virtue of the collusion of said defendants hereinabove named, and each of them, in the wrongs hereinabove complained of and their interest therein, said defendant The First National Bank and Trust Company of Oklahoma City, a corporation, in its capacity as such, and

as Executor of the Estate of said Rosa B. Wright Rettenmeyer, and its attorneys, have failed and refused and continue to fail and refuse to institute and prosecute a suit of any kind or character for the recovery of said assets of said estate and increment or profit or any part thereof; that on the contrary, they conspired together to conceal and secrete the true facts respecting the conversion of said property and assets. Plaintiffs, although diligently endeavoring so to do, were unable to discover the facts hereinabove set forth until less than one year prior to the day and date of instituting this proceeding.

XVI. Plaintiffs further allege that the defendant Joseph A. Rettenmeyer has repudiated and breached the terms of the Will and codicils thereto of said Rosa B. Wright (later Rettenmeyer) by virtue of which act and conduct he has forfeited all rights vested in him and those claiming by, through or under him in or to any part or portion of the estate of said deceased, including specifically the moneys and property hereinabove referred to and the claims asserted hereunder.

XVII. Plaintiffs further assert that by virtue of the wrongs herein complained of they as devisees and heirs under the Will and codicils of said Rosa B. Wright (later Rettenmeyer) have suffered and sustained damages in the sum of $191,864.64, together with interest at the rate of 6% per annum thereon from the date of said conversion to this date in the further sum of $39,487.30; that said damages resulted from the fraud, oppression and malice of defendants by virtue of which plaintiffs are entitled to exemplary and punitive damages in the further sum of $231,351.94.

Wherefore, premises considered, plaintiffs bring this suit and pray judgment against said defendants and each of them jointly and severally and in favor of plaintiffs and said estate of Rosa B. Wright (later Rettenmeyer) deceased, as their respective interests appear, for the sum of $231,351.94, together with interest thereon at 6% per an-

num until paid, as actual damages, and for the further sum of $231,351.94 as exemplary and punitive damages, together with all costs of this action.

Young, Young & Young,
By (s) Glenn A. Young,

Attorneys for Plaintiffs George Denham, Clarence Denham, and Mary Jane Hopkins, *nee* Wright;

H. K. Glunt and Young, Young & Young,
By (s) Glenn A. Young,
H. K. Glunt,

Attorneys for Plaintiffs Leona Holcomb, Leona Holcomb, as guardian of the person and estate of Donald George Fleming, a minor, Ed Denham, and Frank Denham.

Attorneys Lien Claimed Young, Young & Young, and H. K. Glunt.

EXHIBIT 12.

Statement of the United States District Judge and Proceedings on Entry Injunctive Order Complained of.

(Proceedings, November 12, 1954.)

Be it remembered, that on the 12th day of November, A. D., 1954, in the above-designated court, sitting at Tulsa, Oklahoma, the Honorable Royce H. Savage, United States District Judge, presiding, this above-styled and numbered cause came on regularly for oral arguments on motions of F. E. Pence, the First National Bank and Trust Company of Oklahoma City, and Frances X. Rettenmeyer, executrix of the estate and Joseph A. Rettenmeyer, deceased, to intervene as parties plaintiff.

• • • • • • • •

The Court: Well, of course, I am under a different im-

pression than that. If I didn't enter an order restraining the prosecution of the action against Aetna, that is what I intended to do.

Mr. Young, Sr.: Well, in that regard I would like to call Your Honor's attention to, that the order does not restrain the prosecution of the suit for conversion against Aetna; it does restrain the prosecution against Aetna of a suit involving this insurance policy, and that clearly does not involve the policy.

The Court: Well, I don't have it before me, but getting back to the thought that I was attempting to express, it seems to me that that might be the more *satisfacory* plan of procedure, to settle all this litigation, let the conversion case be tried in the State Court where all the parties are in court and hold this matter in abeyance, and by virtue of holding it in abeyance the Aetna would still be protected against the possibility of being adjudged liable in the State Court action and having to pay on the annuity contract too. That is something for you to think about in connection with it—with the further proceedings in the case.

You may file your brief in ten days.

Mr. Woolsey: Very well, Your Honor, I will get it in before the ten days elapse.

The Court: And you may have ten days to answer.

Mr. Woolsey: Very well, I would like to clarify this restraining order at this time because I don't want to be faced, when the case is called for trial in the State Court, with the proposition of Mr. Young saying, We are proceeding against the Aetna Life Insurance Company. I think the Denhams in the State Court below should be restrained from proceeding against Aetna Life Insurance Company in any case growing out of the conversion or transfer of these funds.

The Court: That was the order that I intended to make.

Mr. Woolsey: May I prepare an additional or supplemental order to clarify Your Honor's statement?

The Court: You may.

Mr. Woolsey: Very well.

Mr. Young, Sr.: If Your Honor please, we would like to have counsel make formal application for such an order so we could protect ourselves.

The Court: He has made a formal application and I have advised him he may prepare——

Mr. Young: I mean that should be—under the rules an application for restraining order should be made in writing and verified.

The Court: I am construing the order heretofore made.

Mr. Young, Sr.: That order did not call for such an order as that.

The Court: Well, you may prepare a supplemental order which will be intended to construe the order heretofore made, and submit it and I will sign it.

Mr. Woolsey: Very well.

Mr. Young, Sr.: Will that be without notice to us or opportunity to be heard on the matter?

The Court: That is with the notice that you presently—

Mr. Young, Sr.: Well, we will want to give notice of intention to appeal from the order on the ground—we can set them up now—we have had no notice—we had no notice of the entry of the application originally for this restraining order; we have had no notice nor has there been filed a verified application for the present order; there has no evidence been offered to support an order purporting to restrain the prosecution of a suit in a court having jurisdiction, which was prior—previously executed; no bond executed to indemnify against damages in such a case; and upon the further ground that the entry of a restraining order under these circumstances is expressly prohibited by the federal law and the federal rules of civil procedure.

The Court: You may present the order.

Mr. Woolsey: Very well.

Mr. Allen: If it please the Court, there is one matter I would like to call to your attention.

The Court: All right, Mr. Allen, go ahead.

Mr. Allen: It is just this: Your Honor suggests that he is thinking possibly it would be more expeditious to hold this matter in abeyance until the District Court questions are solved. I think Your Honor should bear this in mind: There are now two District Court cases pending. Others may develop. Actually the most expeditious manner in which all this can be settled is right here. If we wait until these two District Court cases and such other cases on this same question that may be filed are disposed of it may go on forever. The controlling question is simply this: Is this a valid policy. And the two issues on that are: Was Rosa B. Wright Rettenmeyer competent——

The Court: I understand the point of view I get from this side of the room is that the only question is do we have a valid policy. From this side the point of view is the only question is whether these bonds were converted—we are not interested in the policy. But it is not quite as simple as you have said.

Mr. Allen: I only meant to suggest that holding this matter in abeyance here might be the least expeditious manner——

The Court: It could be. I just suggest that possibility. I haven't indicated that that is what we will do. I wouldn't be disposed to do it unless there could be some plan or procedure that could be worked out by agreement. I am thinking about the possibility of denying the application for leave to intervene.

Mr. Allen: That is as to the people except Frances X. Rettenmeyer, executrix?

The Court: Yes. And then these parties are confronted with the possibility of having a judgment entered against them for the value of these bonds, and perhaps be foreclosed from recouping from Aetna or from having judgment

over against Aetna. And ordinarily, if there is some way to avoid such an inconsistent outcome of litigation and such an inequitable result, I would be disposed to try to figure out some way to do it.

The Court will be in recess.

Mr. Young, Sr.: May I complete my record on this other matter? I wanted to add, absence of jurisdiction to the other record. Possibly it is sufficiently covered.

The Court: All right.

Filed Nox. 19, 1954. (R. 82-83)

EXHIBIT 13.

Injunctive Order Complained of.

"ORDER CONSTRUING RESTRAINING ORDER HERETOFORE MADE.

Now on this 12th day of November, 1954, it appearing that some confusion has arisen pertaining to the Restraining Orders of the Court heretofore made and entered on the 16th day of April, 1954, and the Order thereafter made on the 17th day of September, 1954, on verbal application of the plaintiff Aetna Life Insurance Company, and in order to construe the Order heretofore made and clarify said order,

It Is Ordered, Adjudged and Decreed, that the defendants, Leona Holcomb, individually, Leona Holcomb as Guardian of the Person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Frank T. Denham, Edward Denham, Clarence M. Denham, George N. Denham, Leona Denham Holcomb, Mary Jane Hopkins, Ellen Cash, Marion Rettenmeyer, Rufus Denham, Marion Denham, Lewis Denham, Frank X. Rettenmeyer, and Raymond D. Rettenmeyer, be and they are hereby enjoined, and restrained from instituting any suit in any State Court, or are restrained from prosecuting any suit pending in any State Court and further, they are enjoined and restrained from instituting or prosecuting in any United States Court, any

suit or proceeding on account of or pertaining to Policy No. AN 33409 issued by Aetna Life Insurance Company by Rosa B. Wright Rettenmeyer, reserving unto them, however, the right to appear in this suit and assert their claims which they may have if any and that this injunction and restraining order only restrains any judicial proceedings against the Aetna Life Insurance Company by said defendants and enjoins and restrains the prosecution of any suits or causes of action against the plaintiff, Aetna Life Insurance Company including particularly, Cause No. 29092 in the District Court of Creek County, State of Oklahoma, styled Leona Holcomb, *et al., vs.* Aetna Life Insurance Company, *et al.,* and Cause 87402 in the District Court of Tulsa County, State of Oklahoma, entitled, Mary Jane Hopkins, *et al., vs.* Aetna Life Insurance Company, *et al.,* to which action of the court in entering the above captioned Order, the defendants, represented by the firm of Young, Young & Young, to-wit: Leona Holcomb, individually, Leona Holcomb, as Guardian of the Person and Estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Frank T. Denham, Edward Denham, Clarence M. Denham, George N. Denham, Leona Denham Holcomb, Mary Jane Hopkins, object and give notice of their intention to appeal in open court on the grounds and for the reason that they assert they had no notice of the entry of the application originally for the restraining order and no notice, nor has there been filed, a verified application for the present Order of the Court, no evidence offered to support an order purporting to restrain the prosecution of any suit in a court having jurisdiction, no bond executed to indemnify against damages, and upon the further grounds, that the entry of a restraining order is especially prohibited by Federal Laws and *Federals* Rules of Procedure.

Royce H. Savage, Judge.

Filed Nov. 22, 1954." (Tr. 77 and 78.)

EXHIBIT 14.

Statute—Text in full.

28 U. S. C., Sec. 1335. INTERPLEADER.

"(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another, June 25, 1948, c. 646, 62 Stat. 931."

EXHIBIT 15.

28 U. S. C. F. R. C. P. 65—Text in Full.

"Rule 65. *Injunctions.*

"(a) *Preliminary; Notice.* No preliminary injunction shall be issued without notice to the adverse party.

"(b) *Temporary Restraining Order; Notice; Hearing; Duration.* No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such

shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

"(c) *Security.* No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof. As amended Dec. 27, 1946, effective March 19, 1948.

"A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

"(d) *Form and Scope of Injunction or Restraining Order.* Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

"(e) *Employer and Employee; Interpleader; Con-*

stitutional Cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U. S. C., Sec. 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U. S. C., Sec. 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges. As amended Dec. 29, 1948, effective Oct. 20, 1949."

PROOF OF SERVICE.

I hereby certify that on the ... day of Dec., 1955, I served a copy of the foregoing petition for writ of certiorari upon counsel for the Aetna Life Insurance Company, Farmer, Woolsey, Flippo & Bailey, by depositing the same in the post office at Sapulpa, Oklahoma, with postage thereon fully prepaid, addressed to said counsel at their post office address, to-wit:

Farmer, Woolsey, Flippo & Bailey,
Attorneys at Law,
National Bank of Tulsa Building,
Tulsa, Oklahoma,

.....,
Attorney for Petitioners.

ACKNOWLEDGMENT OF SERVICE.

The undersigned, Farmer, Woolsey, Flippo & Bailey, Attorneys at Law, National Bank of Tulsa Bldg., Tulsa, Oklahoma, Attorneys for Aetna Life Insurance Company, a corporation, hereby acknowledges service of the above and foregoing Writ of Certiorari to have been duly made on us, this the ... day of December, 1955.

.....,
Member of firm, for Respondent.